Disability-Based Discrimination in Canadian Employment and the Defence of Justification (Accommodation), 2014

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Abstract

This paper examines the statutory law of human rights in Canada in the context of discrimination in the area of employment based on the prohibited ground of disability. Part II of the paper discusses what human rights-based "discrimination" is (and what it is not), the legal burden that complainants must meet to establish prima facie *discrimination, and the evidentiary burden faced by alleged discriminators required to rebut the* prima facie *case, if made out by the complainant. Part III of the paper discusses the legal burden that discriminators must meet to establish the Defence of Justification; and specifically: the legal elements of the Defence of Justification; the so-called "Duties"—to Accommodate, to Co-operate/Facilitate & to Inquire—of the various parties (employers, trade unions, employees) that arise in the context of the Defence of Justification; the procedural and substantive requirements of accommodation of disabilities; and the point of "undue hardship."*

Part IV of the paper concludes with the observation that it is important for all parties—employers, trade unions, and employees—to understand the legal principles discussed in this paper in order to successfully advance or respond to claims of discrimination in employment based on disability; but more importantly, so that the parties can avoid *litigation by appropriately addressing the accommodation of workplace disabilities* before *matters develop into disputes.*

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I. Introduction

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Part IV of the paper concludes with the observation that it is important for all parties—employers, trade unions, and employees—to understand the legal principles discussed in this paper in order to successfully advance or respond to claims of discrimination in employment based on disability; but more importantly, so that the parties can *avoid* litigation by appropriately addressing the accommodation of workplace disabilities *before* matters develop into disputes.

II. Disability-Based Discrimination in Employment

Before discussing what "discrimination" *is* in the context of common law provincial,[1] territorial[2] and federal[3] human rights legislation, it is important to point out what it <u>*is not*</u>—"the right to the equal protection and equal benefit of the law without discrimination …based on …mental or physical disability."[4] This constitutional

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[1] *Alberta Human Rights Act*, RSA 2000, c A-25.5; *Human Rights Code*, RSBC 1996, c 210; *The Human Rights Code*, C.C.S.M. c. H175; *Human Rights Act*, RSNB 2011, c 171; *Human Rights Act, 2010*, SNL 2010, c H-13.1; *Human Rights Act*, RSNS 1989, c 214; *Human Rights Code*, RSO 1990, c H19; *Human Rights Act*, RSPEI 1988, c H-12; *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1.

[2] *Human Rights Act*, SNu 2003, c12; *Human Rights Act*, SNWT 2002, c 18; *Human Rights Act*, RSY 2002, c 116.

[3] *Canadian Human Rights Act*, RSC 1985, c H-6.

[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11, s 15 [the "*Charter*"].

protection and the jurisprudence that interprets it must be distinguished from the statutory right to be free from discrimination in employment based on disability and the jurisprudence that interprets that statutory right. In particular, the early constitutional "dignity test and … comparator groups" analyses[5] that has subsequently been rejected by the Supreme Court of Canada even in the context of *Charter* s 15 breach considerations[6] (where it was developed in the first place) has no place in judicial considerations of human rights discrimination analyses.[7] Yet unfortunately some administrative adjudicators[8] and courts[9] continue to incorrectly apply the rejected constitutional "comparator groups" analysis to statutory human rights complaints.

What is "discrimination" based on disability (ground) in employment (area) then, in the context of common law provincial, territorial and federal human rights legislation? One must first look to the specific language of the applicable human rights legislation. Federally the prohibition reads:

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[5] "…determination of the appropriate comparator, and the evaluation of the contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity … conducted from the perspective of the claimant": *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12 at para 59 (QL) ["*Law*"].

[6] The Supreme Court has "moved away from the rigid comparative analytical approach based on the identification of comparator groups that had been adopted in some of its decisions… The majority's reasoning in *Walsh* illustrates the problems with comparator groups that the subsequent decision in *Withler* sought to address, namely that "a mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply'" …It is appropriate to "proceed to the application of the s. 15(1) test in this case untethered from [the] *Walsh* ['comparator group analysis']": *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] S.C.J. No. 5 at paras 169, 345-346 (QL) ["*Quebec*"], citing *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] S.C.J. No. 12 at para 60 (QL) ["*Withler*"]. See also, *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] S.C.J. No. 61 at para 30 (QL) ["*Moore*"].

[7] "…a determination of *prima facie* discrimination is made by considering whether the conduct complained of is that which the [*Human Rights*] *Code* has, by definition, prohibited, and not on a 'comparative analysis": *Lavender Co-Operative Housing Assn. v. Ford*, 2011 BCCA 114, [2011] B.C.J. No. 401 at para 77 (QL); "…the elements of the burden of proof in a claim under the *Charter* [are] different than the elements of the burden of proof in a claim under the *Human Rights Act*. [Further,] the scope of the remedies that might be available [under the *Charter* are] also different than those remedies available … under the *Human Rights Act*": *Ayangma v. Eastern School Board*, 2010 PECA 2, [2010] P.E.I.J. No. 4 at para 15 (QL).

[8] See eg *Renfrew County and District Health Unit v Ontario Nurses' Assn. (Robertson Grievance)*, 234 L.A.C. (4th) 367, [2013] O.L.A.A. No. 311 at paras 31-32 (QL); *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Macri Grievance)*, 228 L.A.C. (4th) 227, [2012] B.C.C.A.A.A. No. 151 at para104 (QL*); Newfoundland and Labrador Nurses' Union v Eastern Regional Integrated Health Authority (Grievance G-5783-08 Maternity Leave)*, [2012] N.L.L.A.A. No. 11 at para 28 (QL); *Halfyard v. City of Calgary*, 2011 AHRC 5.

[9] See eg *Lethbridge Industries Ltd. v. Alberta (Human Rights Commission)*, 2014 ABQB 496, [2014] A.J. No. 900 at para 125 (QL) ["*Lethbridge Industries*"].

> 3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. …
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> 4. A discriminatory practice, as described in sections 5 to 14.1, may be the subject of a complaint under Part III and **anyone** found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 53 and 54.[10]
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> 7. It is a discriminatory practice, directly or indirectly,
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> (a) to refuse to employ or continue to employ any individual, or
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> (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.[11]
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> 25. "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.[12]

In Alberta, it reads:

> 7 (1) No employer shall
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> (a) refuse to employ or refuse to continue to employ any person, or
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> (b) discriminate against any person with regard to employment or any term or condition of employment, because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.[13]
>
> 44(1)(h) "mental disability" means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder.[14]
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> 44(1)(l) "physical disability" means any degree of physical disability, infirmity, mal-formation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, service dog, wheelchair or other remedial appliance or device.[15]

With the exception of Manitoba's[16] and Nova Scotia's[17] legislation, none of the common law provincial, territorial or federal human rights legislation contains an express

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[10] *Canadian Human Rights Act*, RSC 1985, c H-6, ss 3(1), 4; emphasis added.
[11] *Ibid*, s 7.
[12] *Ibid*, s 25.
[13] *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 7(1); emphasis added.
[14] *Ibid*, s 44(1)(h).
[15] *Ibid*, s 44(1)(l).
[16] "In this Code, "discrimination" means (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or (c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose

definition of "discrimination" that is not unhelpfully circular.[18] Jurisprudence provides guidance as to the meaning of "discrimination".

Discrimination may be of at least four different forms: direct (intentional), discrimination based on (incorrectly) "perceived" characteristics (direct—perceived), indirect (or adverse effect or adverse impact), and systemic (also known as "systematic"). Systemic discrimination—"discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination [but] is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief…that the exclusion is the result of 'natural' forces, for example, that women 'just can't do the job'"[19]—is closely related to adverse effect discrimination and so will not be separately analysed in this paper. Harassment, including sexual harassment (or harassment based on disability), is discrimination,[20] but it does not import the duty to accommodate, but rather the

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identity or membership is determined by any characteristic referred to in subsection (2); or (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2)" (*The Human Rights Code*, C.C.S.M. c. H175, s 9(1)).

[17] "For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disad-vantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society" (*Human Rights Act*, RSNS 1989, c 214, s 4).

[18] See eg "For the purposes of this Part, a 'discriminatory practice' means any practice that is a discriminatory practice within the meaning of sections 5 to 14.1" (*Canadian Human Rights Act*, RSC 1985, c H-6, s 39); "'discrimination' includes the conduct described in section 7, 8 (1) (a), 9 (a) or (b), 10 (1) (a), 11, 13 (1) (a) or (2), 14 (a) or (b) or 43" (*Human Rights Code*, RSBC 1996, c 210, s 1); "'discrimination' includes the conduct described in subsections 7(6), 9(1), 10(1), 11(1), 12(1), 13(1) and sections 14 and 15" (*Human Rights Act*, SNu 2003, c 12, s 1); "'discrimination' includes the conduct described in subsections 11(1) and (2) and 12(1) , section 13, subsections 14(1) , (4) and (5) and 16(1) , sections 17 and 18, subsection 19(1) and section 20" (*Human Rights Act, 2010*, SNL 2010, c H-13.1, s 2(d)); "'discrimination' includes the conduct described in subsections 7(1) and (2), 8(1), 9(1), 10(1), 11(1), 12(1) and sections 13 and 14" (*Human Rights Act*, SNWT 2002, c 18, s 1); "'discrimination' means discrimination in relation to age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals" (*Human Rights Act*, RSPEI 1988, c H-12, s 1(1)(d)).

[19] *C.N.R. v Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, [1987] S.C.J. No. 42 at para. 34 (QL) ["*C.N.R.*"]. "'[S]ystemic discrimination' [is] defined … as 'practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics'…" (*Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] SCJ No 61 at para 59 (QL) ["*Moore*"].)

[20] "[S]exual harassment in the course of employment constituted discrimination on the ground of sex." (*Robichaud v. Canada* (Treasury Board), [1987] 2 SCR 84 at para. 6 ["*Robichaud*"]).

employer's duty to provide a safe harassment-free workplace;[21] it is also outside the scope of this paper. The Supreme Court has stated: "Direct discrimination occurs in [employment] where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, 'No Catholics or no women or no blacks employed here.'"[22] By contrast, indirect, or

> "…adverse effect discrimination… arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. …An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.[23]

The British Columbia Court of Appeal provides the following statement recognizing discrimination based on "perceived" characteristics in the context of "disability" being the prohibited ground:

> 38 Discrimination is defined in s. 1 of the *Human Rights Code* to include conduct that offends s. 13(1)(a). A finding that there was a "refusal to continue to employ a person" on the basis of a prohibited ground is discrimination. Therefore, under s. 13(1)(a), to establish a *prima facie* case of discrimination, an employee must establish that he or she had (or was perceived to have) a disability, that he or she received adverse treatment, and that his or her disability was a factor in the adverse treatment: *Martin v. 3501736 Inc*. (c.o.b. *Carter Chevrolet Oldsmobile*), [2001] B.C.H.R.T.D. No. 39, 2001 BCHRT 37 at para. 22, [*Martin*].[24]

And the Court of Queen's Bench of Alberta wrote:

> "As a matter of law… if a person is discriminated against because of a perceived disability, rather than because of a real disability, that person is protected by human rights legislation."[25]

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[21] "There is a clear duty on an employer to provide a safe work environment for its employees." (*John v Flynn* (2001), 54 O.R. (3d) 774, [2001] O.J. No. 2578 at para. 26 (QL) (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 394). *John v. Flynn* was followed in Alberta in *Gartner v. 520631 Alberta Ltd*., 2005 ABQB 120, [2005] A.J. No. 194 at para. 67-8 (QL). In *Shebansky v. Kapchinsky, Bar K 3 Ranch and Smith* (1981), 28 A.R. 451, [1981] A.J. No. 730 at para. 19 (QL) (QB), Stratton, J. wrote: "The duty of an employer…may be stated more generally than simply to provide a safe system of work. It is to take reasonable precautions to safeguard his employees from injury." A more recent Alberta decision is *Heller v. Martens*, [2000] A.J. No. 1678 paras. 19, 32 (QL) (Q.B.), affirmed 2002 ABCA 122, where the Court considered the "obligation, on the part of the employer, to maintain a safe workplace" in the absence of a statute mandating particular measures. The Court held that there is such an obligation.

[22] *Ontario (Human Rights Commission) v. Simpsons Sears Ltd*., [1985] 2 SCR 536 at para. 18 ["*Simpsons Sears*"].

[23] *Ibid*; emphasis added.

[24] *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, 2006 BCCA 57, [2006] BCJ No 262 (QL) ["*Health Employers*"].

[25] *Vantage Contracting Inc. v. Marcil*, 2004 ABQB 247, [2004] A.J. No. 368 at para 31 (QL); emphasis added. See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand* (City), 2000 SCC 27, [2000] S.C.J. No. 24 at paras 78, 81 (QL) ["*Boisbriand*"].

It should be noted that intent to discriminate is immaterial, and is not an element required to be proved to make out a claim of discrimination:

> It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory. …To take the narrower view and hold that intent is a required element of discrimination under the *Code* would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create…injustice and discrimination by the equal treatment of those who are unequal… The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination. It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof.[26]

The onus is on the complainant employee (or her union in the context of grievance arbitration) to establish a *prima facie* case of discrimination. The complainant can do this by adducing evidence sufficient to establish the following legal test: "to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact."[27] This is a recent reiteration by the Supreme Court of Canada in the context of discrimination based on disability (ground) in "service[s] customarily available to the public" (area) of the legal test long applied in the area of employment: "to establish a case of *prima facie* discrimination: an employee must establish that he or she had (or was perceived to have) a physical or mental disability; he or she received adverse treatment; and his or her disability was a factor in the adverse treatment."[28] This three-part test effectively captures all forms of discrimination,

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[26] *Simpsons Sears, supra* note 22 at paras. 12, 14; emphasis added.
[27] *Moore, supra* note 19 at para 33.
[28] *Forsyth v. Coast Mountain Bus Co*., 2013 BCCA 257, [2013] B.C.J. No. 1138 at paras 26-27 (QL), leave to appeal to SCC refused, [2013] S.C.C.A. No. 338 (QL) ["*Forsyth*"]; *Peel Law Assn. v. Pieters*, 2013 ONCA 396, [2013] O.J. No. 2695 at para 56 (QL) ["*Peel Law*"]; *Walton Enterprises (c.o.b. Midas Auto Services Experts) v Lombardi*, 2013 ONSC 4218, [2013] O.J. No. 3306 at para 28 (QL) ["*Walton Enterprises*"]; *Hawkes v. Prince Edward Island Human Rights Commission*, 2012 PESC 15, [2012] P.E.I.J. No. 13 at para 40 (QL), affirmed, 2013 PECA 3, [2013] P.E.I.J. No. 5 (QL) ["*Hawkes*"]; *Shaw v. Phipps*, 2012 ONCA 155, [2012] O.J. No. 2601 at para 14 (QL) ["*Phipps*"]; *Wright v. College and Assn. of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267, [2012] A.J. No. 943 at para 121 (QL), Berger JA dissenting, leave to appeal to SCC refused, [2012] S.C.C.A. No. 486 (QL) ["*Wright*"]; *Boehringer Ingelheim (Canada) Ltd. v. Kerr*, 2011 BCCA 266, [2011] B.C.J. No. 1046 at paras 15, 29 (QL) ["*Boehringer*"]; *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace,*

including: direct (intentional); direct (perceived); indirect (adverse effect); and indirect (systematic).

It should be noted that the majority's decision in *Gooding,*[29] which relies on Abella J.'s minority reasons in *McGill,*[30] and the decisions that follow it are not good law. As Manitoba Arbitrator Graham has written:

> It is not easy to reconcile the differing analyses contained in the majority decisions in *Kemess* and [*Gooding*], particularly given the refusal of the Supreme Court of Canada to grant leave to appeal in either case. Nonetheless, I make the following observations and findings: The law is settled that a drug or alcohol addiction constitutes a disability; According to the test for *prima facie* discrimination as set forth in *Kemess*, and also endorsed by Madam Justice Kirkpatrick in her minority decision in [*Gooding*], which test I accept as a proper formulation of the law, it is necessary to find that the Grievor's disability (i.e. his addiction) was a factor in his adverse treatment, i.e. the termination of his employment; …I am not persuaded by the majority's conclusion in [*Gooding*] that the grievor in that case was not discriminated against because he suffered no greater impact for his misconduct, than any other employee would have suffered. That reasoning, when applied to this case, overlooks the fact that the Grievor's addiction made it much more likely that he would breach the reporting requirements of the Policy, than would an employee who does not suffer from an addiction. One of the salient features of discrimination, as defined in Section 9(1) of the Manitoba *Human Rights Code*, is differential treatment based on an enumerated characteristic (in this case, a physical or mental disability). The Grievor was treated differentially because his disability made it much more likely that he would run afoul of the reporting requirements of the Policy, than would an employee who was not addicted.[31]

Interestingly, Tysoe JA., who agreed with Huddard JA.'s articulation of the test in *Gooding*[32] (released 18 September 2008), in *Domtar*[33] (released 11 February 2009) agreed with Levine, and Smith JJA. that the proper test is as set out by Finch CJBC, Hall and Mackenzie JJA. in *Kemess Mines*.[34] Then in *Armstrong,*[35] a fourth panel of the BC

Transportation and General Workers of Canada (CAW-Canada), Local 111, 2010 BCCA 447, [2010] B.C.J. No. 1998 at para 59 (QL) ["*Coast Mountain*"]; *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56, [2010] B.C.J. No. 216 at para. 21 (QL), leave to appeal to SCC refused, [2010] S.C.C.A. No. 128 ["*Armstrong*"]; *Communications, Energy and Paperworkers' Union of Canada, Local 789 v. Domtar Inc*., 2009 BCCA 52, [2009] B.C.J. No. 202 at paras. 29, 36 (QL) [*Domtar*]; *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*, 2008 BCCA 357, [2008] B.C.J. No. 1760 at para 52 (QL), leave to appeal to SCC refused, [2008] S.C.C.A. No. 460 (QL) ["*Gooding*"], per Kirkpatrick J.A. (dissenting); *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, 2006 BCCA 57, [2006] B.C.J. No. 262 at para 38 (QL), leave to appeal to SCC refused, [2006] S.C.C.A. No. 139 (QL) ["*Health Employers*"]; *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58 at para. 44; leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 140 (QL) ["*Kemess Mines*"].

[29] *Gooding, supra* note 28 at paras 1 – 18.

[30] *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] S.C.J. No. 4 (QL) ["*McGill*"]

[31] *Legal Aid Lawyers Assn. v. Manitoba (Fawcett Grievance)*, 181 L.A.C. (4th) 296, [2009] M.G.A.D. No. 6 at para. 97, 98 (QL) ["*Legal Aid Lawyers*"].

[32] *Gooding, supra* note 28.

[33] *Domtar, supra* note 28.

[34] *Kemess Mines, supra* note 28.

Court of Appeal, Newbury, Huddart and Tysoe JJ.A., cited the *Kemess Mines* "three-step analysis… developed to determine whether *prima facie* discrimination is established."[36] Again, Huddard JA. who articulated the majority test in *Gooding* (released 18 September 2008), in *Armstrong* (released 9 February 2010) agreed with Newbury and Tysoe JJ.A. that the *Kemess Mines* test (reiterated by the Supreme Court of Canada in *Moore*[37]) is correct. In *Coast Mountain*[38] (released 15 October 2010) Tysoe J.A., writing for the Court, held that "[w]hile there is the difference between the two types of discrimination [systemic discrimination vs individual discrimination], the basic approach for determining whether *prima facie* discrimination has been established is the same for both. … the three-step approach set out in [*Health Employers/Kemess Mines*] for determining the existence of *prima facie* discrimination…"[39] In *Boehringer*[40] Tysoe J.A. agreed with Low and Kirkpatrick JJ.A. that "The three-part test for determining whether there is *prima facie* discrimination [is that t]he complainant must prove that: (1) he or she had (or was perceived to have) a disability; (2) he or she received adverse treatment; and (3) his or her disability was a factor in the adverse treatment."[41] In *West Fraser*,[42] the majority of the BC Court of Appeal wrote: "a finding of discrimination based on disability requires the application of a three-part test: (1) Is the grievor disabled? (2) Has the grievor suffered adverse treatment? (3) Is there evidence from which it is reasonable to infer that the disability was a factor in the adverse treatment?"[43] In *Forsyth*,[44] Tysoe J.A., again writing for the Court, wrote:

> Both *Health Employers Assn.* and *Kemess Mines* involved discrimination in an employment situation on the basis of a disability. Chief Justice Finch stated the test in that context in *Health Employers Assn.* as follows:
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> > [38] ... to establish a *prima facie* case of discrimination, an employee must establish that he or she had (or was perceived to have) a disability, that he or she received adverse

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[35] *Armstrong*, *supra* note 28.
[36] *Ibid*. at para. 21.
[37] *Moore*, *supra* note 19.
[38] *Coast Mountain*, *supra* note 27.
[39] *Ibid* at para 59.
[40] *Boehringer*, *supra* note 28.
[41] *Ibid* at paras 15, 29.
[42] *West Fraser Mills Ltd. (Skeena Sawmill Division) v. United Steelworkers of America, Local I-1937*, 2012 BCCA 50, [2012] B.C.J. No. 190 (QL) ["*West Fraser*"].
[43] *Ibid* at para 33.
[44] *Forsyth*, *supra* note 28.

> treatment, and that his or her disability was a factor in the adverse treatment ...[45]

Between those eight decisions then, thirteen BC Court of Appeal Justices[46] adopt the *Kemess Mines* test; even Huddard and Tysoe JJ.A. have each endorsed *Kemess Mines* as setting out the correct test subsequent to their majority decision in *Gooding.* The Court in *Armstrong* wrote:

> The parties made extensive submissions to us with respect to the issue of whether, on the basis of *McGill University Health Centre* and [*Gooding*], there is now a requirement to show that the adverse treatment was based on arbitrariness or stereotypical presumptions. In my view, such separate requirement does not exist, and the goal of protecting people from arbitrary or stereotypical treatment is incorporated in the third element of the *prima facie* test.[47]

Two Court of Queen's Bench of Alberta decisions incorrectly added a fourth element that the complainant must establish to the *prima facie* discrimination test—"the Respondent's knowledge or imputed knowledge of the circumstances giving rise to the claim of discrimination must be established by the complainant as part of its *prima facie* case."[48] The legal test to establish discrimination must apply effectively to all types of discrimination equally. Evidence of an employer's "knowledge" (or lack thereof) of an employee's personal characteristic that places him or her into a protected ground—*viz.* disability—can logically only be relevant in a situation where direct discrimination has been alleged. However, the relevance of such evidence is limited to proving (employee) or rebutting (employer) the element of the *prima facie* discrimination test as to whether the "disability was a factor in the adverse treatment", or not. Employer knowledge of the employee's disability is otherwise immaterial as to whether "an employee … had (or was perceived to have) a disability, that he or she received adverse treatment, and that his or her disability was a factor in the adverse treatment." Employer knowledge of the employee's disability cannot logically be a fourth element an employee bears the legal burden to establish in making out a *prima facie* case of discrimination, as discussed further below.

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[45] *Ibid* at para 27.
[46] Finch C.J.B.C., Bennett, Hall, Huddard, Kirkpatrick, Levine, Low, Lowry, Mackenzie, Newbury, Ryan, Smith and Tysoe,JJ.A.
[47] *Armstrong*, *supra* note 28 at para. 27.
[48] *Burgess v. Stephen W. Huk Professional Corp*., 2010 ABQB 424, [2010] A.J. No. 756 at para 85 (QL) ["*Burgess*"]; followed in *Telecommunications Workers Union v. Telus Communications Inc.*, 2013 ABQB 298, [2013] A.J. No. 514 at paras 38-39 (QL), affirmed 2014 ABCA 154, [2014] A.J. No. 467 (QL) ("knowledge" element of *prima facie* test overturned at para 29) ["*Whitford QB*"].

This state of the law in Alberta diverged from the established law across Canada, and is resulted in wrong and unjust decisions; for example, in *Shimp*[49] the Alberta Human Rights Tribunal, following *Burgess* (as it was required by the doctrine of *stare decisis* to do),[50] set out the following test:

> [167] … In order for Ms. Shimp to succeed in her claim of discrimination, she must establish that she was suffering from a physical disability as outlined in the Act and that it was her physical disability that led to the respondent's decision to terminate her employment. This means the respondent had to have knowledge that Ms. Shimp did in fact have a physical disability.
>
> [168] What is critical in terms of the evidence is whether or not the respondent had knowledge of Ms. Shimp's alleged physical disability prior to her September 20, 2007 termination and **whether this knowledge played a factor in Ms. Shimp's termination**.[51]

The *prima facie* discrimination test applied in Alberta had thus been judicially perverted into: "to establish a *prima facie* case of discrimination, an employee must establish [1] that he or she had a disability, that [2] he or she received adverse treatment, and [3] that his or her employer's knowledge of his or her disability was a factor in the adverse treatment." Or: "to establish a *prima facie* case of discrimination, an employee must establish [1] that he or she had a disability, that [2] he or she received adverse treatment, and [3] that his or her disability was a factor in the adverse treatment, and [4] that his or her employer had knowledge of his or her disability." Such a legal test: was in direct conflict with established binding Supreme Court of Canada jurisprudence; was absurd in relation to allegations of unintentional direct, perceived direct, adverse effect, and systemic discrimination; and thus imposed an impossible legal burden to meet on the complainant in the vast majority of factual circumstances. For example:

a. How can an employee prove that an employer knew about a disability that was unknown to both the employee and the employer at the time the employee experienced the adverse treatment and the unknown disability was a factor in the adverse treatment?
b. How can an employee prove that an employer knew about a disability that she did not have but the employer incorrectly perceived her to have, and the perceived (but non-existent) disability was a factor in the adverse treatment?

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[49] *Shimp v Livingstone Range School Division #68*, 2010 AHRC 11 ["*Shimp*"].
[50] *Ibid* at para 175.
[51] *Ibid* at paras 167-168; emphasis added.

c. Why should an employee have to prove that an employer knew about a disability where the employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon disabled employees?
d. Why should an employee have to prove that an employer knew about a disability where the employer's practices or attitudes have, whether by design or impact, the effect of limiting disabled individuals' right to the opportunities generally available because of attributed rather than actual characteristics?

Each of the above scenarios have been judicially determined to be discriminatory, and the discrimination is provable on the well-known and longstanding three-part test; but it would be impossible to prove those forms of discrimination if the employer's knowledge of the disability is added as a 4th element of the legal test. Discriminators can and do discriminate unknowingly and unintentionally, and such discrimination is equally proscribed under human rights legislation as is direct intentional discrimination. Further, "knowledge" in relation to discrimination (the *prima facie* case test) denotes intentional (willful or reckless) or subconscious (stereotypical) differential treatment—what else could its relevance be? The Supreme Court of Canada has clearly stated that "intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation."[52] In *C.N.R.* the Supreme Court of Canada wrote:

> **27** … the imputation of a requirement of "intent", even if unrelated to moral fault, failed to respond adequately to the many instances where the effect of policies and practices is discriminatory even if that effect is unintended and unforeseen. …
>
> **32** The rejection of a necessity to prove intent and the unequivocal adoption of the idea of "adverse effect discrimination" by the courts is the result of a commitment to the purposive interpretation of human rights legislation. …
>
> **33** … Canadian human rights legislation is directed not only at intentional discrimination, but at unintentional discrimination as well. In particular, the prohibition of discrimination in the *Canadian Human Rights Act* has been held to reach situations of "adverse effect discrimination": *Bhinder*. But unintentional discrimination may occur in another form, with potentially greater

[52] *Simpsons Sears, supra* note 22 at para 13; emphasis added. See also *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, [1989] S.C.J. No. 42 at para 32 (QL); *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, [1990] S.C.J. No. 129 at para 67 (QL): "To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would…defeat one of the primary goals of anti-discrimination statutes [to address systemic discrimination]."

> consequences in terms of the number of people who are disadvantaged…."systemic discrimination".[53]

"Furthermore, the terms of the British Columbia *Code* do not contemplate one type of employment-related discrimination being treated differently from another."[54] The same is true in the context of all common law provincial, territorial and federal human rights legislation. On 6 May 2014 the Alberta Court of Appeal corrected the above-discussed anomaly in Alberta's human rights law:

> Demonstrating an employer's knowledge of an employee's disability is unnecessary, in a case alleging adverse-effect discrimination. By definition, adverse-effect discrimination is the uniform application of a seemingly neutral employment policy to all employees, regardless of whether some employees have protected characteristics. The impugned policy applies to a disabled employee whether or not the employer knows about the disability. The basic three-part test is sufficient to accommodate cases where an employer's knowledge is relevant to a *prima facie* case, and thus "knowledge" should not be added as a fourth element of the *prima facie* case test.[55]

However, evidence of knowledge (or lack thereof) of the complainant's protected ground *may be* relevant under the well-known and longstanding three-part *prima facie* discrimination test, but its relevance is limited to the 3rd element of the test; namely, whether the protected ground (disability here) was a factor in the adverse treatment. There are two ways that a respondent may avoid liability where a *prima facie* case of discrimination is made out: (1) by adducing evidence to rebut the complainant's evidence supporting the 3rd "a factor" element of the test; or (2) by proving the elements of the Defence of Justification discussed below. The Ontario Court of Appeal explains:

> **64** Early in its decision, the Divisional Court referred to the definition of a *prima facie* case stated by the Supreme Court of Canada in … *Simpsons Sears Ltd.*, …: "a prima facie case of discrimination 'is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the applicant's favour in the absence of an answer from the respondent."
>
> **65** … the *prima facie* case test defines what is necessary to establish substantive discrimination. It is no different than in every other evidentiary context. Since a *prima facie* case involves evidence that, if believed, would establish the claim, a respondent faced with a *prima facie* case at the end of the claimant's case must call evidence to avoid an adverse finding.
>
> **66** A respondent may avoid an adverse finding by [1] calling evidence to show its action is not discriminatory **or** by [2] establishing a statutory defense that justifies the discrimination.

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[53] *C.N.R., supra* note 19 at paras 27, 32-33.
[54] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46 at para 45 (QL) ["*Meiorin*"].
[55] *Telecommunications Workers Union v. Telus Communications Inc*., 2014 ABCA 154, [2014] A.J. No. 467 at para 29 (QL) ["*Whitford CA*"].

> **67** In a case in which the respondent's "answer" is reliance on a statutory defense, the Supreme Court, in *Ontario (Human Rights Commission) v. Etobicoke (Borough),* [1982] 1 S.C.R. 202, has made clear that the **burden of proof** does indeed shift to the respondent.
>
> **68** In a case in which the respondent's "answer" is to lead further evidence to rebut the inference that its action was discriminatory, only the **evidential** burden shifts. …
>
> **70** The shifting of the evidential burden, as opposed to the burden of proof, is common in innumerable other legal contexts….
>
> **73** In discrimination cases … the law, while maintaining the burden of proof on the applicant, provides respondents with good reason to call evidence. Relatively "little affirmative evidence" is required before the inference of discrimination is permitted. And the standard of proof requires only that the inference be more probable than not. Once there is evidence to support a *prima facie* case, the respondent faces the tactical choice: explain or risk losing. …
>
> **82** … A *prima facie* case framework in the discrimination context is no different than that used in many other contexts. Its function is to allocate the legal burden of proof and the tactical obligation to adduce evidence. It governs the outcome in a case where the respondent declines to call evidence in response to the application.
>
> **83** On the other hand, in a case where the respondent calls evidence in response to the application, the *prima facie* case framework no longer serves that function. After a fully contested case, the task of the tribunal is to decide the ultimate issue whether the respondent discriminated against the applicant. After the case is over, whether the applicant has established a *prima facie* case, an interim question, no longer matters. The question to be decided is whether the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that the discrimination has occurred.
>
> **84** …Tribunals that use such an approach find it useful first to satisfy themselves that the record contains sufficient evidence to support a finding of discrimination before turning to consider [1] evidence that might counter the inference of discrimination **or** [2] establish a statutory defense.[56]

The Ontario Superior Court of Justice reiterated:

> **27** In order to establish that a person has contravened s. 5(1) of the *Code*, the onus is on the applicant to prove a *prima facie* case of discrimination on a protected ground. If he or she does so, the **evidentiary burden** then shifts to the respondent to establish that he or she had a credible and acceptable explanation for the conduct. …[57]

In short, where the complainant adduces evidence and thus establishes a *prima facie* case of discrimination, the evidentiary burden then shifts to the respondent to adduce evidence to rebut the *prima facie* case by establishing that he had a credible and acceptable explanation for the conduct, thus preventing the complainant from meeting the ultimate legal burden of proving discrimination ("evidence that might counter the inference of discrimination", such as lack of employer knowledge). For example, where a complainant alleges the employer terminated her employment because of her gender (pregnancy) and adduces sufficient evidence to make out a *prima facie* case of discrimination, the employer may adduce rebuttal evidence that it did not know she was

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[56] *Peel Law, supra* note 28 at paras 64-68, 70, 82-84; emphasis added.
[57] *Walton Enterprises, supra* note 28 at para 27; emphasis added.

pregnant at the time it decided to terminate her employment in the hopes of establishing a lack of nexus between the pregnancy and the decision to terminate—showing that the pregnancy was not "a factor" in the termination. If successful, the employer will have rebutted the *prima facie* case and prevented the employee from meeting her legal burden of proof to establish discrimination. This use of evidence to show (lack of) employer knowledge is entirely legitimate but markedly different than incorporating a 4th element of the legal test (employer knowledge) that the employee has the legal burden to prove. The latter, which the *Burgess*[58] and *Whitford*[59] cases did in Alberta, was an error of law. While *Burgess* was not appealed, *Whitford* was. The Alberta Court of Appeal's 6 May 2014 judgment[60] corrected this anomaly in Alberta's human rights law, bringing the *prima facie* discrimination test back in line with the rest of Canada's.

If the respondent fails to rebut the *prima facie* case of discrimination through adducing rebuttal evidence, and discrimination is held to have occurred, it may still avoid liability by "establish[ing] a statutory defense"; namely, the Defence of Justification (*bona fide* occupational requirement/qualification), discussed in Part III below.

III. The Defence of Justification (Accommodation)

i. What is the Defence of Justification?

Just as with discrimination based on disability (ground) in employment (area), to analyse the statutory Defence of Justification in the context of common law provincial, territorial and federal human rights legislation one must first look to the specific language of the applicable human rights legislation. The *Canadian Human Rights Act*, ss 15(1)(a) reads:

> 15. (1) It is not a discriminatory practice if
>
> > (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement; …[61]

In Alberta, the defence reads:

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[58] *Burgess, supra* note 48.
[59] *Whitford QB, supra* note 48.
[60] *Whitford CA, supra* note 55.
[61] *Canadian Human Rights Act*, RSC 1985, c H-6, s 15(1)(a); emphasis added.

> 7(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement.[62]

None of the common law provincial, territorial or federal human rights legislation contains an express definition of "*bona fide* occupational requirement" or "*bona fide* occupational qualification"[63] although some set certain minimum elements that must be met to establish a "BFOR/BFOQ".[64] Jurisprudence provides guidance as to the meaning and elements of the Defence of Justification (being a BFOR/BFOQ). Before 9 September 1999:

> **19** The conventional approach to applying human rights legislation in the workplace require[d] the tribunal to decide at the outset into which of two categories the case falls: (1) "direct discrimination", where the standard is discriminatory on its face, or (2) "adverse effect discrimination", where the facially neutral standard discriminates in effect …
>
> **20** In the case of direct discrimination, the employer may [have] establish[ed] that the standard is a BFOR by showing: (1) that the standard was imposed honestly and in good faith and was not designed to undermine the objectives of the human rights legislation (the subjective element); and (2) that the standard is reasonably necessary to the safe and efficient performance of the work and does not place an unreasonable burden on those to whom it applies (the objective element). …
>
> **22** A different analysis applie[d] to adverse effect discrimination. The BFOR defence d[id] not apply. *Prima facie* discrimination established, the employer need only [have] show[ed]: (1) that there is a rational connection between the job and the particular standard, and (2) that it cannot further accommodate the claimant without incurring undue hardship…[65]

However, with the release of its decision in *Meiorin* on 9 September 1999 the Supreme Court of Canada adopted

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[62] *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 7(3); emphasis added.

[63] "Reasonable occupational qualification" is the term used in the *Human Rights Act*, RSNS 1989, c 214, the *Human Rights Act*, RSPEI 1988, c H-12, and *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1. "Bona fide and reasonable justification" is the term used in the *Human Rights Code*, RSBC 1996, c 210, and the *Human Rights Act*, SNu 2003, c12. "Reasonable requirements or qualifications for the employment" and "reasonable cause for the discrimination" are the terms used in the *Human Rights Act*, RSY 2002, c 116.

[64] "For any [discriminatory] practice … to be considered to be based on a bona fide occupational requirement … it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost" (*Canadian Human Rights Act*, RSC 1985, c H-6, s 15(2)**.**); "In order for a [discriminatory] practice … to be based on a bona fide occupational requirement, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on a person who would have to accommodate those needs" (*Human Rights Act*, SNWT 2002, c 18, s 7(4)); "The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any" (*Human Rights Code*, RSO 1990, c H19, s 11(2); see also s 24(2)).

[65] *Meiorin*, *supra* note 54 at paras 19-20, 22. See also *Moore*, *supra* note 19 at para 61.

> …a unified approach [to determining when an employer may be justified in applying a standard with discriminatory effects] that (1) avoids the problematic distinction between direct and adverse effect discrimination, (2) requires employers to accommodate as much as reasonably possible the characteristics of individual employees when setting the workplace standard, and (3) takes a strict approach to exemptions from the duty not to discriminate, while permitting exemptions where they are reasonably necessary to the achievement of legitimate work-related objectives…[66]

Thus pre-9 September 1999 jurisprudence analyzing and applying legislative defences to discrimination are not good law, and the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR/BFOQ is the correct law in relation to all forms of discrimination:

> **54** …An employer may **justify** the impugned standard by establishing on the balance of probabilities:
>
> 1 that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> 2 that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> 3 that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
>
> **55** …It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands. …
>
> **62** The employer's third and final hurdle is to demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose… The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. When referring to the concept of "undue hardship", it is important to recall … that "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test". It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship. …
>
> **67** …if individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR. The employer has failed to establish a defence to the charge of discrimination. …[67]

The legal burden of proof is on the employer to establish the Defence of Justification, and to do so it has to prove all three elements of the defence. At the third step, the employer

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[66] *Meiorin, supra* note 54 at paras 50, 53. See also *Moore, supra* note 19 at para 61.
[67] *Meiorin, ibid* at paras 54-55, 62, 67; emphasis added.

must prove "that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose" and to do so it must prove "that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer."

In assessing "undue hardship" the trier should "…consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard…"[68] The Alberta Court of Appeal recently cited the Federal Court for the proposition that: "there is no procedural right to accommodation… under CHRA or the *Meiorin* test, once it is determined that substantive accommodation is not possible."[69] However, it must be asked "who is to determine, and how is it to be determined, that substantive accommodation is not possible" without a procedure to determine that very question in the first place? Doing away with the tri-party procedural aspect of the "duty to accommodate" would effectively vest in the employer the power to unilaterally "determine that substantive accommodation is not possible" before a process to make that very determination is even undertaken; and thus the employer could unilaterally do away with the legal requirement to undertake the procedural aspect of the duty to accommodate whose raison d'être is to determine if a substantive accommodation can be found that would not impose undue hardship on the employer. Such a proposition is illogically absurd.

"[F]actors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship … are not entrenched, **except** to the extent that they are expressly included or excluded by statute."[70] For example, under the *Canadian Human Rights Act*, RSC 1985, c H-6, s 15(2), the factors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship are expressly included; namely, "health, safety and cost."

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[68] *Ibid* at para 66.
[69] *Witford CA, supra* note 55 at para 48, citing *Attorney General of Canada v Cruden*, 2013 FC 520, [2013] F.C.J. No. 599 at paras 67-76 (QL), affirmed, 2014 FCA 131, [2014] F.C.J. No. 518 (QL) ["*Cruden,*"].
[70] *Meiorin, supra* note 54 at para 63.

"At [the Defence of Justification] stage in the analysis, it must be shown that alternative approaches were investigated… The *prima facie* discriminatory conduct must also be 'reasonably necessary' in order to accomplish a broader goal… In other words, an employer … must show 'that it could not have done anything else reasonable or practical to avoid the negative impact on the individual'."[71] For example, in *Moore* the Supreme Court of Canada wrote:

> **52** …the District undertook *no* assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate… The failure to consider financial alternatives completely undermines what is, in essence, the District's argument, namely that it was justified in providing no meaningful access to an education for Jeffrey because it had no economic choice. In order to decide that it had *no* other choice, it had at least to consider what those other choices were.[72]

This is an example of no procedure adopted to assess the issue of substantive accommodation. Undue hardship must be proved by the employer with "cogent evidence", and not merely "anecdotal or impressionistic evidence":

> **79** …the arbitrator noted that, "other than anecdotal or 'impressionistic' evidence concerning the magnitude of risk involved in accommodating the adverse-effect discrimination suffered by the grievor, the employer has presented no cogent evidence ... to support its position that it cannot accommodate Ms. Meiorin because of safety risks". The arbitrator held that the evidence fell short of establishing that Ms. Meiorin posed a serious safety risk to herself, her colleagues, or the general public. Accordingly, he held that the Government had failed to accommodate her to the point of undue hardship. This Court has not been presented with any reason to interfere with his conclusion on this point, and I decline to do so. The Government did not discharge its burden of showing that the purpose for which it introduced the aerobic standard would be compromised to the point of undue hardship if a different standard were used.[73]

"Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them."[74] The fact that "accommodation without imposing undue hardship" is a component of a statutory defence to a (*prima facie*) case of discrimination is often lost on advocates and adjudicators. There is no free-standing legal "duty to accommodate" on employers that can be "triggered" by certain factual circumstances, or

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[71] *Moore, supra* note 19 at para 49; emphasis added.
[72] *Ibid* at para 52; emphasis added.
[73] *Meiorin, supra* note 54 at para 79; emphasis added.
[74] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, [1999] S.C.J. No. 73 at para 19 (QL) ["*Grismer*"]. See also *Moore, supra* note 19 at para 62.

at all[75] (the result of not accommodating to the point of undue hardship is the employer's inability to prove the Defence of Justification). There is no free-standing legal "duty to inquire" or legal "duty to investigate" on employers that can be "triggered" by certain factual circumstances, or at all[76] (the result of an employer's wilful blindness to a potential disability in the face of reasonable cause to believe a disability might be present is the employer's inability to prove the Defence of Justification).[77] There is no free-standing legal "duty to cooperate" or legal "duty to facilitate" on employees that can be "triggered" by certain factual circumstances, or at all (the result of an employee's failure to cooperate with, or facilitate, her own accommodation may be the employer's ability to prove the Defence of Justification (undue hardship), or may affect the remedies ordered where liability for discrimination is found). There are no free-standing positive legal obligations or "duties" on the employer or the employee in relation to these issues. Like "wilful or reckless" (*viz*. "intentional") discrimination perpetrated by employers, an employee's alleged failure to "cooperate" or "facilitate" her own accommodation may "go to remedial consequences, not liability." In *Robichaud* the Supreme Court of Canada wrote:

> **15** …the intention of the employer is irrelevant, at least for purposes of s. [53](2). Indeed, it is significant that s. [53](3) provides for additional remedies in circumstances where the discrimination was reckless or wilful (i.e., **intentional**)…
>
> **19** … while the conduct of an employer is theoretically irrelevant to the imposition of liability in a case like this, it may nonetheless have important practical implications for the employer. Its conduct may preclude or render redundant many of the contemplated remedies. For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. **These matters, however, go to remedial consequences, not liability**.[78]

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[75] "[T]he duty to accommodate is not a freestanding duty but arises only as part of a defence to a case *of prima facie* discrimination… The duty to accommodate a disabled person does not arise as a free-standing issue… That duty arises only when the disabled person has first established a *prima facie* case of discrimination. …Although the Board did not specifically state that this process involves a finding of *prima facie* discrimination, a duty to accommodate is not a free-standing duty and can only arise after such a finding. The Board's failure to expressly discuss the need to establish *prima facie* discrimination does not mean that arbitrators can find a duty to accommodate without first addressing the issue of *prima facie* discrimination. Arbitrators must apply human rights principles **correctly**, and in the context of accommodation, the correct approach is to first consider *prima facie* discrimination." (*Health Employers, supra* note 28 at paras 28, 34, 37; emphasis added).

[76] "…liability for a discriminatory dismissal does not rest on a freestanding duty to investigate." (*Walton Enterprises, supra* note 28 at para 54; emphasis added).

[77] *Lethbridge Industries, supra* note 9 at paras 116 – 120.

[78] *Robichaud v. Canada (Treasury Board),* [1987] 2 S.C.R. 84, [1987] S.C.J. No. 47 at para (QL) ["*Robichaud*"]; emphasis added.

The Court was referring to the *Canadian Human Rights Act*, RSC 1985, c H-6, ss 53(2), (3), which read:

> (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate [various remedial powers listed]…
>
> (3) **In addition** to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice **wilfully or recklessly**.[79]

ii. The So-Called "Duties" to Accommodate, Co-operate/Facilitate & Inquire

The common law provincial, territorial and federal human rights legislation does not only prohibit "employers"[80] from discriminating on prohibited grounds (including disability), but also "employee organizations"[81] (including "trade unions"[82]), "employers' organizations"[83] and "occupational associations."[84] It is important to note that as both employers and trade unions face claims of discrimination, the Defence of Justification is available to both as well—both may argue that a discriminatory practice amounts to a BFOR/BFOQ in appropriate circumstances. Although the jurisprudence makes reference to various "duties" (the duty to accommodate, the duty to co-operate/facilitate), in fact there are no positive legal "duties" imposed on any party, as noted above. The result of an employer's inability or failure to "demonstrate… that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer"[85] is simply its failure to make out the Defence of Justification—this is not the same as a positive duty imposed on an employer as a matter of law. The same is true for trade unions faced with a claim of discrimination. Similarly,

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[79] *Canadian Human Rights Act*, RSC 1985, c H-6, ss 53(2), (3).
[80] See eg *Canadian Human Rights Act*, RSC 1985, c H-6, s 7; *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 7.
[81] See eg *Canadian Human Rights Act*, RSC 1985, c H-6, s 25.
[82] See eg *Canadian Human Rights Act*, RSC 1985, c H-6, ss 7, 9, 10; *Alberta Human Rights Act*, RSA 2000, c A-25.5, ss, 7, 9, 39.
[83] See eg *Canadian Human Rights Act*, RSC 1985, c H-6, ss 7, 10; *Alberta Human Rights Act*, RSA 2000, c A-25.5, ss 7, 39.
[84] See eg *Alberta Human Rights Act*, RSA 2000, c A-25.5, ss 39, 44(1)(j).
[85] *Meiorin*, *ibid* at para 54.

employees have no positive legal "duty to co-operate" with their employer and/or trade union; however, the failure to do so may result in a reduced or no remedy available to the employee who has suffered unjustifiable discrimination.[86] Further, employers have no positive "duty to inquire", but their failure to do so in certain circumstances can result in its failure to make out the Defence of Justification. However, the jurisprudence does not make this important distinction, and discusses these issues in the context of positive "duties" owed by the various parties.

If employers unilaterally, or with the agreement of trade unions, implement a work-rule or policy that *prima facie* discriminates against persons or groups on a prohibited ground, the policy must contain provisions which accommodate the characteristics of those persons or groups to the point of undue hardship:

> Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics.[87]

Regarding trade unions, "the duty to accommodate only arises if a union is party to discrimination. It may become a party in two ways."[88]

> First, it may cause or contribute to the discrimination in the first instance by participating in the formulation of the work rule that has the discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement. It has to be assumed that all provisions are formulated jointly by the parties and that they bear responsibility equally for their effect on employees. …
>
> Second, a union may be liable for failure to accommodate the religious beliefs of an employee notwithstanding that it did not participate in the formulation or application of a discriminatory rule or practice. This may occur if the union impedes the reasonable efforts of an employer to accommodate. In this situation it will be known that some condition of employment is operating in a manner that discriminates on religious grounds against an employee and the employer is seeking to remove or alleviate the discriminatory effect. If reasonable accommodation is only possible with the union's co-operation and the union blocks the employer's efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination. In these circumstances, the union, while not initially a party to the discriminatory conduct and having no initial duty to accommodate, incurs a duty not to contribute to the continuation of discrimination. It cannot

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[86] *Lethbridge Industries*, *supra* note 9 at para 116: "When these absences rose to the level that termination was being considered, the Company should have made inquiries that may have assisted in the accommodation process. If at this point Mr. Schulz declined to disclose any medical information, further accommodation may not have been possible" (emphasis added).

[87] *Grismer*, *supra* note 74 at para. 19.

[88] *Central Okanagan School District No. 23 v Renaud*, [1992] 2 S.C.R. 970, [1992] S.C.J. No. 75 at para. 35 (QL) ["*Renaud*"].

> behave as if it were a bystander asserting that the employee's plight is strictly a matter for the employer to solve. I agree with the majority in Office and Professional Employees International Union, Local 267 at p. 13 that "Discrimination in the work place is everybody's business".[89]

Discrimination in the work place being "everybody's business," it follows that persons claiming the right to be accommodated (usually employees) also have a "duty to cooperate" or "duty to facilitate" their own accommodation:

> The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in *O'Malley*. At page 555, McIntyre J. stated:
>
> > Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.
>
> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.[90]

In *Brewer,*[91] the Alberta Court of Appeal discussed the "two aspects of the failure to co-operate." It wrote: "The first is the obligation of a complainant to co-operate with the Commission's investigation. The second is the obligation of a complainant to co-operate with his or her employer's attempts to accommodate a disability."[92] In relation to the first aspect the Court wrote: "the Commission was entitled to take the view that the respondent could not legitimately control contact between the Investigator and her doctors with respect to relevant and material matters. … What information should reasonably be provided to the Commission during an investigation is directly within its mandate."[93]

If an employee fails in her or his duty to cooperate/facilitate, it has been held that the employer or trade union has discharged its duty to accommodate to the point of undue hardship;[94] however, as noted above, such matters go to remedial consequences, not to

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[89] *Ibid* at paras 36-37.
[90] *Ibid* at para. 43.
[91] *Brewer v Fraser Milner Casgrain LLP*, 2008 ABCA 435, [2008] A.J. No. 1433 (QL) ["*Brewer*"].
[92] *Ibid* at para 19.
[93] *Ibid* at paras 20-21.
[94] *Re Ottawa Civic Hospital and O.N.A. (Hodgins)* (1995), 48 L.A.C. (4th) 388. See also footnote 86, *supra*.

legal liability—discrimination may be proved and the defence of Justification not be made out, yet a reduced or no remedy may follow. A decision of the British Columbia Supreme Court[95] correctly held that it would be an "erroneous assumption that the duty to facilitate is absolute, and that any failing on the part of the Grievor will relieve the employer of the duty to accommodate."[96] A finding that an employee failed in his or her duty to facilitate could result in a lesser remedy for the employee who suffered discrimination at the hands of the employer and/or trade union.[97] The British Columbia Court of Appeal has stated: "An addicted employee does have a duty to facilitate accommodation through rehabilitation… however, the scope of the employee's duty may vary depending on the relevant factors … including whether the employee is in denial or unaware of his addiction/disability."[98] An employee's "duty" may include:

1. making an initial request for accommodation;[99]
2. demonstrating the need for accommodation;[100]
3. furnishing sufficient information to verify the need for accommodation and to identify specific accommodation needs;[101]
4. assisting in the search for accommodation;[102] and
5. accepting and facilitating the implementation of an accommodation that is reasonable in the circumstances;[103]
6. reasonably helping him or herself.[104]

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[95] *Canada Post Corp. v Canadian Union of Postal Workers*, 2007 BCSC 1702, [2007] B.C.J. No. 2553 (QL).
[96] *Ibid* at para. 74.
[97] See eg *Alberta (Infrastructure and Transportation) v Alberta Union of Provincial Employees* (B.D. Grievance), [2007] A.G.A.A. No. 73 ["*Infrastructure and Transportation*"].
[98] *Kemess Mines, supra* note 28at para. 44.
[99] *Infrastructure and Transportation, supra* note 97.
[100] *Ibid*.
[101] *McGowan v Canadian Forest Products Ltd*., 2004 BCHRT 403, [2004] B.C.H.R.T.D. No. 427 at para. 22 (QL).
[102] *Hinter v Save On Foods*, 2006 BCHRT 37, [2006] B.C.H.R.T.D. No. 37 at para. 60 (QL).
[103] *Williamson v Mount Seymour Park Housing Co-operative*, 2005 BCHRT 334, [2005] B.C.H.R.T.D. No. 334 at para. 18 (QL); *Re Advance Engineered Products Ltd. and Advance Employees' Assn*. (2007), 160 L.A.C. (4th) 289, [2007] S.L.A.A. No. 14 at para. 41 (QL); *United Food and Commercial Workers Local 401 v. Canada Safeway Ltd. (Kemp Grievance)*, [2007] A.G.A.A. No. 51 at para. 115 (QL); *Re Klinic Inc*., [1996] M.G.A.D. No. 21 at para. 328 (QL).
[104] "[B]efore claiming that an employer has made no effort to accommodate an employee, the employee must show that he or she personally acted reasonably by mitigating insofar as possible the disruptions that

An employee is not entitled to a perfect solution, and s/he is not entitled to a job of his or her choice; rather s/he has a duty to accept a reasonable attempt by the employer or trade union to accommodate him or her.[105]

In regard to an employer's so-called "duty" to inquire, the following passage accurately captures the law:

> [W]hen an employer is aware, or reasonably ought to be aware, that there may be a relationship between the disability and the performance, the employer has a duty to inquire into that possible relationship before making an adverse decision based on performance. If those inquiries disclose that there is a relationship between the disability and the performance, then the employer has a duty to accommodate the employee to the point of undue hardship: *Meiorin*, supra. However, if the employer reasonably concludes that there is no relationship, then there is no discrimination and the employer has met its duty under the *Code*. Similarly, if the inquiry reveals that there is a relationship, but the employee could not perform to acceptable standards even with reasonable accommodation, then the employer owes no further duty under the *Code*: (see also *Mazuelos v. Clark*, 2000 BCHRT 1 and *Rozon v. Barry Marine*, 2000 BCHRT 15, in both of which the Tribunal found that the respondent discriminated against the complainant by failing to make proper inquiries).[106]

iii. Determining Whether an Existing Standard is Reasonably Necessary for the Employer to Accomplish its Purpose—has the Employer "demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer?

In *Meiorin*[107] the Supreme Court of Canada wrote:

> **64** Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.
>
> **65** Some of the important questions that may be asked in the course of the analysis include:
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> a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

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the employee's disability may cause" (*Re Bérard and Treasury Board (Agriculture Canada)* (1993), 35 L.A.C. (4th) 172, [1993] C.P.S.S.R.B. No. 72 (QL)).

[105] *Canadian Union of Public Employees, Local 1251 v New Brunswick (Department of Public Safety) (Cosman Grievance)*, 145 L.A.C. (4th) 324, [2005] N.B.L.A.A. No. 9 at para. 20 (QL).

[106] *Mould v. JACE Holdings Ltd. (Thrifty Foods)*, 2012 BCHRT 77, [2012] B.C.H.R.T.D. No. 77 at para 55 (QL), citing, *Martin v. 3501736 Inc. (c.o.b. Carter Chevrolet Oldsmobile)*, 2001 BCHRT 37, [2001] B.C.H.R.T.D. No. 39 at para 29 (QL).

[107] *Meiorin, supra* note 54.

b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in Renaud, supra, at pp. 992-96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.

66 Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the **procedure**, if any, which was adopted to assess the issue of accommodation and, second, the **substantive content** of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard.[108]

Specific issues related to the "duty to accommodate", which are beyond the scope of this paper to examine in depth, may include: hiring, promotion, transfer and probation; modified tasks; modified shifts, hours and schedules; absenteeism and leaves of absence; assistive equipment or devices; modified workplace and/or environment; child care; training and re-training; dress policies; discipline and counselling (hybrid cases); remuneration.[109]

iv. When does an Accommodation Become an "undue hardship" for the Employer and/or Trade Union?

In *Grismer*[110] the Supreme Court of Canada stated that "the defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost."[111] The alleged discriminator must prove the Defence of

[108] *Ibid* at paras 64-66; emphasis added.
[109] For an excellent examination of these issues, and accommodation in general, see Kevin D. MacNeill, *The Duty to Accommodate in Employment*, loose-leaf ed (Aurora: Canada Law Book, 2009).
[110] *Grismer*, *supra* note 74.
[111] *Ibid* at para. 32; emphasis added.

Justification on a balance of probabilities to successfully avoid liability. In *Alberta Dairy Pool*[112] the Court provided the following non-exhaustive list of some of the factors that may be relevant to an appraisal of what constitutes "undue hardship":

- financial cost; the size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances;
- disruption of a collective agreement;
- problems of morale of other employees;
- interchangeability of work force and facilities;
- where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations.

The "balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case."[113] "These factors are not engraved in stone. They should be applied with common sense and flexibility in the context of the factual situation presented in each case. The situations presented will vary endlessly."[114] Some human rights legislation provides a statutory definition of "undue hardship." For example, the Saskatchewan *Code* provides:

> 2(1)(q) "undue hardship" means, for the purposes of sections 31.2 and 31.3, intolerable financial cost or disruption to business having regard to the effect on:
>
> (i) the financial stability and profitability of the business undertaking;
>
> (ii) the value of existing amenities, structures and premises as compared to the cost of providing proper amenities or physical access;
>
> (iii) the essence or purpose of the business undertaking; and
>
> (iv) the employees, customers or clients of the business undertaking, disregarding personal preferences;
>
> but does not include the cost or business inconvenience of providing washroom facilities, living quarters or other facilities for persons with physical disabilities where those facilities must be provided by law for persons of both sexes.[115]

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[112] *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, [1990] S.C.J. No. 80 (QL) ["*Alberta Dairy Pool*"].
[113] *Ibid* at para. 62.
[114] *Commission scolaire régionale de Chambly v Bergevin*, [1994] 2 S.C.R. 525, [1994] S.C.J. No. 57 at para. 32 (QL) ["*Bergevin*"].
[115] *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 2(1)(q).

The majority of jurisprudence characterizes "undue hardship" as an onerous standard, as opposed to simple reasonableness. In *Renaud*[116] the Supreme Court of Canada stated:

> [19] …More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept.

However, in *Hydro-Québec*,[117] the unanimous Supreme Court of Canada wrote: "What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances."[118] "[I]n the employment context, the duty to accommodate implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to work and does not cause the employer undue hardship."[119] The Court continued:

> [14] …the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.
>
> [15] However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration. …
>
> [16] The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.
>
> [17] … If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties - or even authorize staff transfers - to ensure that the employee can do his or her work, it must do so to accommodate the employee. …However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.
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> [18] Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably

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[116] *Renaud, supra* note 88.
[117] *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] S.C.J. No. 44 (QL) ["*Hydro-Québec*"].
[118] *Ibid* at para. 12.
[119] *Ibid* at para. 13.

> foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory…"[in such cases,] it is less the employee's handicap that forms the basis of the dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship"…
>
> [19] The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.[120]

The Alberta Court of Appeal recently added:

> What constitutes "undue hardship" is highly fact dependant and individualized, and will vary between situations…[121]
>
> a duty to accommodate …exists even where a collective agreement does not expressly create it…[122]
>
> An employer is obliged to engage in more than a negligible effort to satisfy the duty to accommodate. While the steps taken must be reasonable, as noted above they need not extend to the point of creating undue hardship… The goal of accommodation is to ensure that an employee who is able to work can do so. In practice this means that an employer must accommodate an employee in a way that, while not causing the Employer undue hardship, will ensure that the employee can work. The purpose of the duty is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.[123]

Evidentiary means of proving or disproving undue hardship include:

- Admissions; for example where a defendant's witness frankly acknowledges that no forms of accommodation were even considered in respect to a physically disabled employee;
- Agreed statements of fact;
- Expert witnesses;
- Adverse inferences;
- Evidence of past accommodation and attempts at accommodation by the defendant
- Evidence of accommodation by a similarly situated or related employer/trade union, or a different department therein;
- Terms of applicable collective agreement.

Financial Cost: Evidence of excessive past, present or projected financial costs of accommodation must be supported by cogent evidence (not by speculation), and must

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[120] *Ibid* at paras 14-19.
[121] *Tolko Industries Ltd. v. Industrial Wood and Allied Workers of Canada (Local 1-207)*, 2014 ABCA 236, [2014] A.J. No. 737 at para 35 (QL) ["*Tolko*"].
[122] *Ibid* at para 36.
[123] *Ibid* at para 39.

show that the costs are fairly attributable to the accommodation. The impact of the financial costs on the employer must be balanced against the benefits to the employee needing the accommodation before the financial costs can be declared excessive, and thus an undue hardship. In *Grismer* the Court stated:

> While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. This Court rejected cost-based arguments in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 87-94, a case where the cost of accommodation was shown to be modest. I do not assert that cost is always irrelevant to accommodation. I do assert, however, that impressionistic evidence of increased expense will not generally suffice.[124]

Disruption of Collective Agreement: for a defendant to prove on a balance of probabilities that an accommodation would disrupt a collective agreement to the point of undue hardship "more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures."[125] The claim of "substantial" or "significant" interference with the collective agreement rights of other employees must be supported by sufficient evidence. Interference with the collective agreement rights of other employees falling short of "substantial" or "significant" will not support a finding of undue hardship.

> The primary concern [for trade unions] with respect to the impact of accommodating measures is not, as in the case of the employer, the expense to or disruption of the business of the union but rather the effect on other employees. The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted.[126]

Morale of Other Employees: In *Renaud* the Court stated:

> The reaction of employees may be a factor in deciding whether accommodating measures would constitute undue interference in the operation of the employer's business. In *Central Alberta Dairy Pool*, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration. I would include in this

[124] *Grismer, supra* note 74 at para. 41.
[125] *Renaud, supra* note 88 at para. 20.
[126] *Ibid.* at para. 38.

> category objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on religious grounds. The contrary view would effectively enable an employer to contract out of human rights legislation provided the employees were *ad idem* with their employer. It was in this context that Wilson J. referred to employee morale as a factor in determining what constitutes undue hardship.[127]

Numerous decisions have considered morale problems of other employees resulting from an accommodation, and if supported by evidence, morale problems may weigh in favour of finding undue hardship, but it is only one factor in the analysis.

Interchangeability of Work Force and Facilities: The size of the employer's operations, and related operations, in addition to the size of the pool of potential replacement workers, are factors considered in determining whether it would be an undue hardship for the employer to transfer replacement workers and/or the (potentially) accommodated employee between its facilities in order to provide an accommodation.

Safety at Issue: Evidence of "serious risk" or "undue safety risk" of an accommodation must be supported by reasonable evidence (not by anecdotal or impressionistic evidence).[128] Some risk incurred by the employee, and imposed on others who stand to be put at risk if the accommodation is implemented, is justified. The defendant must prove that the risk is "serious" or "undue" to successfully argue that an accommodation would impose an undue hardship. Determining the magnitude of the safety risk requires the assessment of three factors—(1) the type of risk; (2) the potential consequences of the risk; (3) the probability of the risk materializing—bearing in mind the level of risk acceptable by an employer/trade union, and society in general. A defendant "may not justify discrimination in employment opportunities by adopting a risk aversion standard that is not reasonably proportional to the actual risk."[129] A few of the many potential safety risks that have been considered in the jurisprudence include: drug or alcohol dependent employees in safety sensitive positions; physical disabilities such as diabetes, multiple sclerosis, and back conditions in relation to employees' ability to perform

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[127] *Ibid.* at para. 30.
[128] *Meiorin, supra* note 54 at para. 79.
[129] *Dominion Colour Corp. v. Teamsters, Local 1880* (Metcalfe Grievance) (1999), 83 L.A.C. (4th) 330.

certain work; extreme fatigue caused by double-shifting of other employees if a person's religious beliefs were to be accommodated through modified schedules.

Duration of Accommodation: Some arbitral decisions suggest that the status of a proposed accommodation as temporary or permanent may be a consideration in assessing undue hardship.

Disabled Employee Unable to Fulfill Obligations Under Employment Contract

In an employment law situation involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.[130] A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must be based on an assessment of the entire situation. Where the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship.[131] The duty to accommodate must be assessed globally in a way that takes into account the entire time the employee was absent from work.[132]

In the labour law context, in order to terminate an employee with just cause for non-culpable (innocent) absenteeism, the employer must make out the following well-established test:

> …the proper analytical approach is for the arbitrator to determine whether the tests for a non-culpable dismissal for excessive innocent absenteeism have been met. These tests, which are well supported by the authorities, are: 1) was the absenteeism excessive; 2) was the employee warned that his or her absence was excessive and failure to improve could result in discharge; 3) was there a positive prognosis for regular future attendance at the time of dismissal; and 4) if the absenteeism was caused by an illness or disability, did the employer attempt to accommodate the employee to the point of undue hardship prior to dismissal.[133]

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[130] *Hydro-Québec*, *supra* note 117 at para. 17.
[131] *Ibid* at para 21.
[132] *Ibid* at para 20.
[133] *Shelter Regent Industries v. Industrial, Wood and Allied Workers of Canada, Local 1-207 (Marples Grievance)*, 124 L.A.C. (4th) 129, [2003] A.G.A.A. No. 114 at para 39 (QL) ["*Shelter*"]; emphasis added.

Interference with Operation of Employer's Business: In *Simpsons Sears*[134] the Court identified "undue interference in the operation of the employer's business"[135] as a relevant factor in assessing undue hardship. This may include administrative inconvenience and scheduling difficulties. There is an obvious overlap with this factor and that of excessive cost.

Customer Preference: Generally customer preference cannot justify prohibited discrimination; however, in rare cases customer preference may be considered as a relevant factor in considering undue hardship,[136] although not in Saskatchewan where the *Code*, s. 2(1)(q)(iv) directs that employees', customers' and clients' personal preferences must be disregarded in analyzing undue hardship.

IV. Conclusion

This paper examined the statutory law of human rights in Canada in the context of discrimination in the area of employment based on the prohibited ground of disability. Part II of the paper discussed what human rights-based "discrimination" is (and what it is not), the legal burden that complainants must meet to establish *prima facie* discrimination, and the evidentiary burden faced by alleged discriminators required to rebut *the prima facie* case, if made out by the complainant. Part III of the paper discussed the legal burden that discriminators must meet to establish the Defence of Justification; and specifically: the legal elements of the Defence of Justification; the so-called "Duties"—to Accommodate, to Co-operate/Facilitate & to Inquire—of the various parties (employers, trade unions, employees) that arise in the context of the Defence of Justification; the procedural and substantive requirements of accommodation of disabilities; and the point of "undue hardship."

It is important for all parties—employers, trade unions, and employees—to understand the legal principles discussed in this paper in order to successfully advance or respond to claims of discrimination in employment based on disability; but more

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[134] *Simpsons Sears*, *supra* note 22.
[135] *Ibid* at para. 23.
[136] See e.g. *Re St. Boniface General Hospital* (1992), 32 L.A.C. (4th) 217; *Johnston v. St. James Community Service Society*, 2004 BCHRT 59, [2004] B.C.H.R.T.D. No. 56 (QL).

importantly, so that the parties can *avoid* litigation by appropriately addressing the accommodation of workplace disabilities *before* matters develop into disputes.